IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WISCONSIN RESOURCES PROTECTION COUNCIL, CENTER FOR BIOLOGICAL DIVERSITY and LAURA GAUGER,

Plaintiffs,

OPINION and ORDER

11-cv-45-bbc

v.

FLAMBEAU MINING COMPANY,

Defendant.

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On April 13, 2012, I denied defendant Flambeau Mining Company's motion for summary judgment and granted in part and denied in part the motion for partial summary judgment filed by plaintiffs Wisconsin Resources Protection Council, Center for Biological Diversity and Laura Gauger in this action brought under the citizen suit provision of the Clean Water Act, 33 U.S.C. § 1365(a)(1). A court trial to resolve the remaining issues is scheduled for May 21, 2012.

Now defendant has filed a motion to dismiss the case on the ground of mootness. Dkt. #143. Because defendant's motion raises a question of justiciability, I must consider it even though the trial is less than one month away and the deadline for filing dispositive motions has long since passed. After reviewing the parties' arguments on the issue, I conclude that defendant has not met the heavy burden of proving mootness. It has not shown that there is no reasonable possibility that it will violate the Clean Water Act in the future or that this court is incapable of providing effective relief to plaintiffs. Therefore, I am denying the motion.

OPINION

Plaintiffs' claims relate to defendant's discharge of polluted storm water from a biofilter on the site of its former mine in Ladysmith, Wisconsin. In the April 13, 2012 Opinion and Order, I determined that plaintiffs had Article III standing to bring this action; that defendant had released water containing pollutants from the biofilter on its property; that Stream C and the Flambeau River are navigable waters subject to the requirements of the Clean Water Act; and that defendant's state law mining permit does not provide a shield against Clean Water Act citizen suits.

In its latest motion, defendant contends that plaintiffs' claims are moot because defendant has removed the biofilter from its former mining site, making it impossible to discharge storm water from the biofilter. Defendant alleges that it started the process for removing the biofilter in 2009, when it initiated discussions with the Wisconsin Department of Natural Resources regarding changes that could improve storm water management on the former mining site. In August 2010, defendant submitted a proposal to the Department that called for the use of infiltration basins and the permanent elimination of the biofilter. On May 17, 2011, a final plan titled "Copper Park Business and Recreation Area Work Plan" was submitted to address storm water management on the site. The work plan proposed a series of changes to storm water management, including removal of the rail berm and culverts west of Highway 27, removal and disposal of sediment from the biofilter, conversion of the biofilter into an infiltration basin and creation of two additional infiltration basins to improve surface water management.

The Department held a public hearing on the work plan on August 31, 2011, including the proposal to remove the biofilter and rely on infiltration basins for storm water management. In September and October 2011, the Department approved the work plan. Neither plaintiffs nor any other members of the public appealed the decision. Construction began sometime in the fall of 2011 and ceased on November 14, 2011 because of winter conditions. On March 5, 2012, the work recommenced and on March 8, 2012, the biofilter "was modified to prevent any further discharges." Aff. of James Hutchison, dkt. #146, at ¶ 15. From March 5, 2012 until April 13, 2012, defendant continued to work on the biofilter, ultimately eliminating it completely. It was replaced by a "state-of-the-art" infiltration basin that was designed to capture and infiltrate storm water into the ground, rather than discharge it from an outlet. The biofilter was excavated and contaminated soils were removed and disposed of in a municipal solid waste landfill. Defendant contends that because the biofilter no longer exists, plaintiffs' claims have become moot.

A court "can lose jurisdiction over citizen suits when a defendant can show that its voluntary conduct has made the case moot." Domino v. Didion Ethanol, LLC, 670 F. Supp. 2d 901, 916 (W.D. Wis. 2009) (citing Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc., 528 U.S. 167, 189 (2000)). This is because "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." Arizonans for Official English v. Arizona, 520 U.S. 43, 67 (1997) (internal citations omitted). Thus, the doctrine of mootness "preclude[s] a court from adjudicating claims that no longer present a concrete and substantial controversy capable of being redressed through specific relief." Natural Resources Defense Council v. Texaco Refining & Marketing, 2 F.3d 493, 502 (3d Cir. 1993); see also Walters v. Edgar, 163 F.3d 430, 432 (7th Cir. 1998) ("If a case becomes moot, the court loses jurisdiction, even though the case was not moot when filed.").

The key issue in a mootness analysis is whether the circumstances existing at the beginning of the litigation have changed in such a way as to prevent the court from providing any effective relief to plaintiffs. A.M. v. Butler, 360 F.3d 787, 790 (7th Cir. 2004); Cantrell v. City of Long Beach, 241 F.3d 674, 678 (9th Cir. 2001) (holding that as long as "effective relief may still be available," case is not moot). In a Clean Water Act citizen suit, injunctions can provide effective relief to plaintiffs in situations in which a defendant's illegal conduct is continuous and ongoing. Laidlaw, 528 U.S. at 185. Civil penalties can provide effective relief by encouraging a defendant to comply with the law and deterring the defendant from engaging in the illegal conduct in the future. Id. at 186. However, if the defendant's wrongful behavior has ceased and there is absolutely no reasonable possibility that the defendant's wrongful behavior will recur in the future, there is nothing to abate and nothing to deter. Id.

Defendant has the burden of establishing mootness. In this way, the mootness doctrine "protects plaintiffs from defendants who seek to evade sanction by predictable protestations of repentance and reform." Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc., 897 F.2d 1128, 1134 (11th Cir. 1990) (internal quotations and citation omitted). Additionally, "by the time mootness is an issue, the case has been brought and litigated, often . . . for years." Laidlaw, 528 U.S. at 191. "To abandon the case at an advanced stage may prove more wasteful than frugal." Id. at 191-92. Thus, to establish mootness, defendants must establish that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." United States v. Concentrated Phosphate Export Association, 393 U.S. 199, 203 (1968). Satisfying this standard is not easy. The Supreme Court has explained that the defendant bears a "heavy burden" to show that the activity has been cured and is not likely to continue. Laidlaw, 528 U.S. at 189.

For example, in Laidlaw, the polluting facility at issue had been "permanently closed, dismantled, and put up for sale, and all discharges from the facility had permanently ceased." Id. at 179. Even so, the Supreme Court reversed the court of appeals' decision finding the case moot, explaining that a defendant's cessation of illegal conduct following the commencement of suit will rarely moot a case; although a change in circumstances can moot a plaintiff's request for injunctive relief, a court can impose civil penalties "to deter future violations and thereby redress the injuries that prompted a citizen suitor to commence litigation." Id. at 174. The Court went on to explain that only when it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur" will events following the commencement of a suit moot a claim for civil penalties. Id. at 189. See also New York Public Interest Research Group v. Whitman, 321 F.3d 316, 327 (2d Cir. 2003) (not "absolutely clear" that defendant would not resume its conduct when it wrote letter of commitment but showed only some evidence of actual implementation); San Francisco BayKeeper, Inc. v. Tosco Corp., 309 F.3d 1153, 1160 (9th Cir. 2002) (although defendant had sold facility to another operator, plaintiff's claim for civil penalties was not moot because facility was still operating, there was possibility of recurring violations and imposition of civil penalties against former owner would deter future owner from pollution violations); Puerto Rico Campers' Association v. Puerto Rico Aqueduct & Sewer Authority, 219 F. Supp. 2d 201, 220 (D.P.R. 2002) (case not moot where company had placed non-permanent seal on its outfall to prevent further discharge into subject river, diverted discharge into another river, retained its discharge permit and retained the ability to process more wastewater than its permit authorized); Public Interest Research Group of New Jersey, Inc. v. Hercules, Inc., 2003 WL 23519620, *13-18 (D.N.J. Oct. 27, 2003) (case moot where defendant had not violated permit in 7 years, had permanently modified its facility and had entered into consent decree and paid monetary penalties to state agency regarding violations).

Applying the Laidlaw principles to this case, I conclude that defendant has not satisfied the "heavy burden" required to establish mootness. In particular, it has not shown that it is absolutely clear that no violations can be reasonably expected to recur in the future, or that there is nothing left for civil penalties to deter. Defendant has not shown that its former mining site is free of pollutants or that it has stopped storm water runoff from the industrial outlot. Defendant asserts that it has replaced the biofilter with an infiltration basin that will cause storm water runoff to infiltrate into the ground rather than flow into Stream C, but defendant has provided very few facts to support its conclusory statements about how the infiltration basin has made discharges "impossible."

According to defendant's May 2011 work plan, which was submitted by plaintiffs in support of their opposition brief, the infiltration basin is about the same size as the biofilter and will collect runoff from the same general region from which the biofilter received runoff. Dkt. #163-1, at § 2.2.4.1 (infiltration basin "will receive runoff from approximately the eastern two-thirds of the parking lot, from the western half of the Equestrian Trailhead area, and from miscellaneous grassed and dirt roads in the area . . . [and] any overflow from the North Copper Park Infiltration Basin"). The work plan also states that water from "[t]he 100-yr, 24-hr storm event will be fully contained within the basin with zero discharge. Storms larger than the 100-yr, 24-hr storm even will overflow the berm on the east side of the basic and will discharge via overland flow to Intermittent Stream C." Id.

The fact that water may overflow in certain circumstances contradicts defendant's argument that discharges from the infiltration basins are impossible because the basin has no outlet. Further, although defendant contends that the work plan's discussion of the 100-year storm may mean that the infiltration basin could potentially overflow only in cases of a "biblical flood," Dft.'s Br., dkt. #167, at 1, defendant has provided no facts to support such a conclusion. As plaintiffs point out, the former biofilter was also "designed for a 100-year storm event," dkt. #60-10, at § 3.2.2.4, and this court has concluded already that runoff overflowed from the biofilter on multiple occasions. It may be that the defendant used different measurements related to potential overflow and 100-year storm events to design the new infiltration basin. However, defendant has provided the court with little guidance on the issue. Also, defendant's expert suggested that there is a possibility of overflow from the infiltration basin in situations in which there are several days of rain, the ground of the basin is frozen or infiltration and evaporation rates are slow. Dep. of Stephen Donohue, dkt. #157, at 57-60. Defendant has provided no facts about these situations, such as how often they may occur.

Plaintiffs contend that infiltration basins require extensive maintenance and may be ineffective in treating storm water runoff, particularly in cold climates. They cite information from the United States Environmental Protection Agency's website regarding the use of infiltration basins, which states that infiltration basis have a "relatively high rate of failure" and have "several limitations," including the possibility that they will become clogged and fail to infiltrate. National Pollutant Discharge Elimination System, "Infiltration," http://cfpub.epa.gov/npdes/stormwater/menuofbmps/index.cfm?action=browse&Rbutton=detail&bmp=69&minmeasure=5 (last visited May 24, 2012). Defendant dismisses this argument as mere speculation, and it is true that plaintiffs' arguments are based on speculation and hypothetical situations. However, in view of the few facts that defendant has provided about the infiltration basin, the short history of the new infiltration basin, which has been in place for less than one month and the lack of any evidence about the effectiveness of the new basin, defendant's arguments about mootness are also speculative.

In sum, defendant has not shown that the new storm water plan and infiltration basin render this case moot. Although defendant may not be discharging storm water into Stream C or the nearby wetlands through the infiltration basin at the present time, it may discharge into the stream in the future if the new infiltration basin cannot accommodate the storm water runoff on the site. Moreover, if the court finds that civil penalties or targeted injunctive relief are appropriate on the merits, they would discourage defendant from discharging wastewater in the future in violation of the Clean Water Act. Thus, because effective relief is still available, this controversy remains live and is not moot.

ORDER

IT IS ORDERED that defendant Flambeau Mining Company's motion to dismiss this case on the ground of mootness, dkt. #143, is DENIED.

Entered this 7th day of May, 2012.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge